Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

LAWRENCE E. ELLIS, a/k/a Laurie Ellis,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Is a "represented person" under 28 C.F.R. §77.3(b) entitled to Fifth Amendment right to counsel protection as explained by *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981)?

2. Does the invocation of the Fifth Amendment right to counsel by a "represented person" during preindictment investigative proceeding bar the government from obtaining subsequent incriminating statements from the defendant under the "separate offense" exception of *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)?

B. PARTIES INVOLVED

The parties are identified in the caption and style of the case.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, LAWRENCE E. ELLIS, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 02 August 1996, rehearing denied 01 October 1996.

D. CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix (hereinafter "A," followed by an appropriate Arabic page number), pages A-1 through A-5, to this petition and is reported as *United States v. Ellis*, 90 F.3d 447 (11th Cir. 1996). Rehearing was denied on 01 October 1996. (A-6).

E. JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on 02 August 1996, (A-1). A timely filed Petition for Rehearing was denied by the Court of Appeals on 01 October 1996. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

The case requires interpretation and application of the Fifth Amendment to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall...be compelled in any criminal case to be a witness against himself....
>
> No person shall be held to answer...without due process of law....

2. Statutory Provisions

28 C.F.R. §77.3(b) provides:

> a person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a)(1)[1]

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[1] **28 C.F.R. §77.3 Represented party; represented person:**

(1) The person has retained counsel or accepted counsel by appointment or otherwise;

(2) The representation is ongoing and concerns the subject matter in question;

(3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law

and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) do not exist.

G. STATEMENT OF THE CASE

1. The Basis for Jurisdiction Below.

Former Nassau County Sheriff Lawrence E. Ellis was indicted for and convicted of federal charges initiated in the United States District Court, Middle District of Florida, Jacksonville Division. The jurisdiction of the United States District Court was invoked under 18 U.S.C. §§3231 and 3402.

The case was timely appealed to the United States Court of Appeal for the Eleventh Circuit. Jurisdiction of the Court of Appeals vested under 28 U.S.C. §1291.

2. Facts Pertinent to the Questions Presented

It is undisputed in this record that: (1) alleged co-

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enforcement proceeding concerning the subject matter of the representation.

conspirator, former Nassau County Deputy Sheriff [Captain] Rocky Mistler, agreed to cooperate with the government on 08 February 1993; (2) after Mistler's interview with government agents on that date, the government had admissible evidence establishing probable cause to believe then Nassau County Sheriff Laurie Ellis had committed federal drug offenses; (3) Mr. Ellis through counsel notified the Assistant United States Attorney in charge of the grand jury investigating Sheriff Ellis, on 09 February 1993, that Mr. Ellis was represented by counsel on matters relevant to the grand jury investigation; (4) Mr. Mistler, at the direction of the government, recorded incriminating conversations with Mr. Ellis on February 10 and 12, 1993, which were admitted during the government's case-in-chief at trial and which included alleged obstruction activities during said meetings with Mistler; (5) the grand jury session scheduled on 26 February 1993, was changed to 19 February 1993, upon

which date the grand jury returned an indictment against Mr. Ellis (R1-71-3-4, 16; R5-5-6, 11-12), which indictment included a charge of conspiracy to obstruct justice between Mr. Ellis and Mr. Mistler "through in or about February 1993," (R1-1-20), which time period was after notice of representation by counsel and after Mr. Mistler began cooperating with the government.

3. Course of the Proceedings

A federal grand jury of the United States District Court for the Middle District of Florida, Jacksonville Division, indicted Lawrence E. Ellis on 19 February 1993. (R1-1).[2] Mr. Ellis, formerly the Sheriff of Nassau County, Florida, was charged with: conspiracy to distribute and to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §846 (count 1); distribution of marijuana, in violation of 21 U.S.C. §841(a) and 18 U.S.C. §2 (count 2); possession

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[2] References to Record on Appeal below.

with intent to distribute cocaine, in violation of 21 U.S.C. §841(a) and 18 U.S.C. §2 (counts 3, 4, 6, 8); possession with intent to distribute marijuana, in violation of 21 U.S.C. §841(a) and 18 U.S.C. §2 (counts 5, 7); conspiracy to obstruct justice, in violation of 18 U.S.C. §371 (count 9); and obstruction of justice, in violation of 18 U.S.C. §1503 (count 10). (R1-1).

On 19 March 1993, Mr. Ellis filed a motion to suppress his statements that had been recorded surreptitiously by a former coconspirator, Rocky Mistler, after the coconspirator had begun cooperating with the government. (R1-43). At the suppression hearing, the Assistant United States Attorney appearing on behalf of the government announced:

> I am willing to stipulate that at the time Mistler recorded the conversation with defendant Ellis, he was acting at the directions of the government, with my knowledge, and that at that time I did know that he was represented by counsel with regard to the investigation which

underlies this case. (R5-5).

(The government relied on Department of Justice Guidelines, "Communications with Represented Persons," at the hearing.) (R1-49, Exhibit 1).

The district court denied the motion to suppress. (R1-74).

A trial jury convicted Mr. Ellis on all counts except a cocaine possession charge, count eight. (R2-135, 140). On 01 October 1993, the district court sentenced Mr. Ellis to serve a total of 192 months in the custody of the Bureau of Prisons, followed by a five-year term of supervised release. (R3-165, 166). The court also ordered Mr. Ellis to pay $450 in special assessments. (R3-166). Mr. Ellis timely filed a notice of appeal from his conviction on 08 October 1993. (R3-167).

That same date, Mr. Ellis moved the district court to appoint on appeal the two attorneys that Mr. Ellis had retained to represent him at trial. (R3-170). These separate

proceedings gave rise to a set of issues relative to an order unsealing *in camera* proceedings regarding attorney-client fee arrangements. The attorney fee issue was referred to the United States Magistrate. After a hearing, the magistrate judge granted Mr. Ellis' motion for appointment of counsel on appeal and ordered that the transcript of the proceeding be released. (R3-189). Mr. Ellis appealed to the district court the magistrate judge's order to release the transcript. (R3-192). The district court denied the appeal and affirmed the magistrate judge's release of the transcript. (R3-212). From that order, Mr. Ellis separately appealed. (R3-213). By order dated 03 April 1995, the Eleventh Circuit Court of Appeals consolidated the two appeals. The issues presented in the instant petition address only the criminal conviction proceedings.

H. REASONS FOR GRANTING THE WRIT

Petitioner Ellis relies upon the "right to counsel," found not in the text of the Sixth Amendment, but in the Court's jurisprudence relating to the Fifth Amendment guarantee that "[n]o person...shall be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court established a number of prophylactic rights designed to counteract the "inherently compelling pressures" of custodial interrogation, including the right to have counsel present.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court established a second layer of prophylaxis for the *Miranda* right to counsel: once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," 451 U.S., at 484-485—which, as the Court most recently held, that counsel must be present,

Minnick v. Mississippi, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). *See McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

Mr. Ellis asks the Court to adopt, as an extension of the reach of *Miranda*, a rule allowing a suspect to invoke the right to counsel by actual communication with government counsel. *See* 28 C.F.R. §77.3(b). In *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), the petitioner was arrested on a charge of armed robbery. After a bail hearing on the armed robbery charge, at which he was represented by an attorney, he was repeatedly questioned by police officers concerning a different crime, and he eventually made an inculpatory statement. *See* 501 U.S. at 173-74, 111 S.Ct. at 2206-07. After his conviction at trial, at which his statement was used against him, petitioner filed for a writ of habeas corpus arguing that his appearance at the bail hearing, accompanied by an attorney, was sufficient to invoke his

Miranda right to counsel, thus invalidating the police-initiated interrogation under the operation of *Edwards*. *See id.* at 174-75, 111 S.Ct. at 2207. After carefully distinguishing the differing objectives of the right to counsel under *Miranda* and the Sixth Amendment, the Court rejected the argument that the assertion of the Sixth Amendment right to counsel was an explicit or implicit assertion of the *Miranda* right to counsel, holding that "[t]he rule of [*Edwards*]...requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *Id.* at 178, 111 S.Ct. at 2209. The government has stipulated to the represented status of Mr. Ellis. The question remains as to what constitutional protections his represented status entitles him.

The Court has explicitly rejected the "bright-line" rule proposed in *McNeil*— "no police-initiated questioning of any

person in custody who has requested counsel to assist him in defense or interrogation"—which was similar to the one advocated by the instant petitioner. *See id.* at 181, 111 S.Ct. at 2211. But of particular interest is the majority's reply to the dissent's prediction that the decision would be circumvented by the explicit invocation of the *Miranda* right to counsel at preliminary hearings. *See id.* at 184, 111 S.Ct. at 2212 (Stevens, J., dissenting).

In *Alston v. Redman*, 34 F.3d 1237 (3d Cir. 1994), the majority noted that premature invocation of the *Miranda* right to counsel would be impermissible:

> We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve. If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against.

> The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Id. at 182 n. 3, 111 S.Ct. at 2211 n. 3 (citations omitted).

But Justice Department guidelines, here no less than 28 C.F.R. §77, have circumscribed a status of "represented person," which, although "not intended to...create substantive rights," 28 C.F.R. §77.11(b), does create a person of recognized status known to be represented by counsel. In this case a targeted represented person from whom the government intended to solicit incriminating statements in circumvention of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), was known and further incriminated in an alleged conspiracy with the government operative in acts after notice of representation and after the codefendant began cooperating.

The Third Circuit has noted the above passage in *McNeil* as anticipatory invocation essentially *dicta*, being a response to a hypothetical posed by the dissent. While the footnote strongly supports the proposition that, to be effective, a request for *Miranda* counsel must be made within "the context of custodial interrogation" and no sooner. *See United Sates v. Wright*, 962 F.2d 953, 955 (9th Cir. 1992); *United States v. Barnett*, 814 F.Supp. 1449, 1454 (D.Alaska 1992), the issue is not settled under the context of 28 C.F.R. §77 *et seq*. under which this case arises.

Some courts, post-*McNeil*, nevertheless, have found a proper invocation of the *Miranda* right to counsel when a suspect has requested counsel prior to interrogation or to the reading of the *Miranda* rights. In *United States v. Kelsey*, 951 F.2d 1196 (10th Cir. 1991), petitioner Joseph Kelsey arrived at his home late one night to find eighteen members of a police narcotics task force conducting a search for contraband.

See id. at 1198. He was searched and arrested before entering the house, and was placed on a couch alongside three others who had been arrested during the raid. Kelsey asked to see his lawyer three or four times, but the police only responded that "if they 'allow[ed] him to see [his] lawyer now, then they would not be able to ask [him] any further questions and would have to take [him] to jail.'... The police also told [Kelsey] that 'if [he] was to cooperate and talk with the officers, then they'd take it easy on [him]....'" *Id.* (alteration in original). Kelsey was not questioned at this point, nor was he read his *Miranda* rights. He was later questioned in his home and made incriminating statements during the interrogation. *See id.*

The Tenth Circuit held that the request by Kelsey for his lawyer was sufficient to invoke the protections of *Edwards*, even thought the request was made before questioning or the reading of *Miranda* rights. *See id.* at 1198-

99. Mindful of the requirement that there be "some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police," *McNeil*, 501 U.S. at 178, 111 S.Ct. at 2209 (emphasis omitted), the Court held that Kelsey's request for counsel after being arrested, when it was "clear from the exchange between Kelsey and the police...that the police intended to question Kelsey at some point at his home, and that the police understood Kelsey to be invoking his right to counsel during questioning," *Kelsey*, 951 F.2d at 1199, was sufficient to trigger *Edwards*. The Court rejected the Government's argument that *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) required that there be questioning *before* the invocation of the right to counsel, finding that the fact that Kelsey asked for an attorney "before the police were required to inform him of that right [was] irrelevant." *Id.* at 1199.

In *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992), the North Carolina Supreme Court examined a similar issue. Georgia Torres was a battered spouse who one night, in the midst of an altercation with her intoxicated husband, shot him to death. Though not placed under arrest, she was transported by a police officer to the sheriff's department, and was detained in a conference room by a deputy from 7 p.m. to 10 p.m., pending questioning concerning the shooting of her husband. At around 10 p.m., she was taken into the sheriff's office, and the sheriff informed her that she would be shortly questioned by two other police officers. *See id.* at 24. At two points, while sequestered in the conference room and while meeting with the sheriff, Torres asked if she needed an attorney, and was told both times that she did not. *See id.* at 23. At 10:35, she was given her *Miranda* warnings, which she waived, was interrogated, and gave an incriminating statement. *See id.* at 25. She was thereafter convicted of

murder.

On appeal, Torres argued that her interrogation violated *Edwards*, since she had made a request for counsel before the police initiated her interrogation. The court accepted her argument, finding that *Edwards* had been violated even though she was not being questioned at the time she requested an attorney:

> ...[T]he State argues that defendant could not have invoked her right to counsel because she was not being questioned at the time she inquired about an attorney.
> ...If defendant "at any stage of the process" indicates her desire to consult with counsel, all questioning must cease.... [A]lthough an individual cannot waive her right to counsel prior to receiving *Miranda* warnings, a suspect in custody can certainly assert her right to have counsel present during her impending interrogation prior to *Miranda* warnings and the actual onset of questioning.

Id. at 25 (citations omitted). The court distinguished footnote three in the *McNeil* opinion by noting that "[t]he examples of 'anticipatory invocation' cited by the Court in that

...footnote...make clear that the Court had in mind situations in which a person was not in custody at the time of her invocation." *Id.* Thus, for the *Torres* court, it was sufficient for *Miranda* and *Edwards* purposes that the suspect was in custody and awaiting interrogation when she invoked her right to counsel. *See id.* at 26 ("It would make little sense to require a defendant already in custody to wait until the onset of questioning or the recitation of her *Miranda* rights before being permitted to invoke her right to counsel.").

While the decisions in *Kelsey* and *Torres* are factually distinguishable from the decision in this case, the suspects in both of those cases, though not being interrogated when they requested counsel, were faced with "impending interrogation." *Torres*, 412 S.E.2d at 26; *Kelsey*, 951 F.2d at 1199. Kelsey had just been arrested in his home, and the dialogue between him and his captors indicated he would be interrogated in his home. *See id.* Torres had been taken to the police

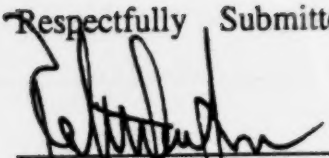
stationhouse immediately after shooting and killing her husband, and she was sitting in a conference room awaiting imminent questioning. *See* 412 S.E.2d at 25-26. Mr. Ellis' situation is analogized to *Kelsey* and *Torres*.

I. CONCLUSION

Mr. Ellis clearly informed the Assistant United States Attorney he was represented. While the case is not a classic *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) case, the government deliberately set out on a course of action intended to obtain incriminating statements. The statements were admitted not only as evidence of past wrongdoing, but also gave rise to subsequent criminal charges of obstruction of justice with the informant Mistler. It is submitted that in the context of the Due Process Clause and the Fifth Amendment right to counsel that unresolved issues in this area should be addressed by the Supreme Court of the United States of America.

The petition for writ of certiorari should be granted, and that relief is respectfully requested.

Respectfully Submitted,



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(Cite as: 90 F.3d 447)

UNITED STATES of America, Plaintiff-Appellee,
The Fernandina Beach News-Leader, Inc.,
Intervenor-Appellee,
v.
Lawrence E. ELLIS, a/k/a Laurie Ellis,
Defendant-Appellant.

Nos. 93-3230, 94-2570.

United States Court of Appeals,
Eleventh Circuit.

Aug. 2, 1996.

***448** Gerald S. Bettman, Jacksonville, FL, for Appellant in No. 93-3230.

James R. Klindt, U.S. Attorney's Office, Jacksonville, FL, Tamra Phipps, Peggy Morris Ronca, Asst. U.S. Attys., Tampa, FL, for Appellee in No. 93-3230.

Roberto Arias, Stephen Weinbaum, Jacksonville, FL, for Appellant in No. 94- 2570.

James Klindt, Asst. U.S. Atty., Jacksonville, FL, for Appellee in No. 94-2570.

Appeals from the United States District Court for the Middle District of Florida.

Before KRAVITCH and BIRCH, Circuit Judges, and SCHWARZER [FN*], District Judge.

FN* Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

WILLIAM W SCHWARZER, Senior District Judge:

This is an appeal from an order of a magistrate judge unsealing the transcript of an in camera hearing on defendant Ellis's application for appointment of counsel. It calls on us to interpret and apply Addendum Four (d)(2) of the Eleventh Circuit Criminal Justice Act Plan. We find no error in the order and affirm.

Also before us is the consolidated appeal from Ellis's conviction. We hold that Ellis's arguments have no merit and affirm his conviction pursuant to Circuit Rule 36-1. [FN1]

FN1. 11th Cir.R. 36-1 provides:
When the court determines that any of the following circumstances exist: (a) judgment of the district court is based on findings of fact that are not clearly erroneous; (b) the evidence in support of a jury verdict is sufficient; (c) the order of an administrative agency is supported by substantial evidence on the record as a whole; (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record; (e) the judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

*449 Proceedings Below

Ellis, the former Sheriff of Nassau County, was convicted of

multiple counts involving drug trafficking and obstruction of justice. During trial and through sentencing, retained counsel represented him. He then moved for leave to appeal in forma pauperis under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. The motion was referred to a magistrate judge who scheduled an in camera hearing.

The Fernandina Beach News-Leader, Inc. filed a motion to intervene and objected to the closure of the hearing. The magistrate judge granted the motion but determined that the News-Leader's claim of access was outweighed by Ellis's contention that disclosure of information he expected to produce at the hearing would, among other things, infringe on his Fifth Amendment rights. The magistrate judge deferred until after the hearing the decision whether the transcript should remain sealed.

Following the in camera hearing, the magistrate judge granted Ellis's motion to proceed in forma pauperis. He also found that the information disclosed was not incriminatory, that it was not an over broad disclosure of private financial matters, and that defense counsel's privacy interest in the fee agreement was not a compelling reason to maintain the transcript under seal, and ordered the transcript unsealed. The district court affirmed the order but stayed the unsealing pending appeal. Ellis now appeals from the order.

Appellate Jurisdiction

The News-Leader, though not otherwise a party, had standing to challenge the denial of access to judicial proceedings. United States v. Valenti, 987 F.2d 708, 711 (11th Cir.1993), cert. denied, 510 U.S. 907, 114 S.Ct. 289, 126 L.Ed.2d 238 (1993). It necessarily has standing here to defend the unsealing order.

An order denying access is reviewable as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Newman v. Graddick, 696 F.2d 796, 800 (11th Cir.1983). While the interest in protecting the press's ability to cover contemporaneously judicial proceedings would not support an interlocutory appeal of an order refusing to deny access, we see no reason for precluding review following final judgment in the underlying proceedings. See United States v. Suarez, 880 F.2d 626, 628 (2d Cir.1989) (order releasing CJA forms at request of newspapers stayed pending appeal, held reviewable). We have held that the fact that they have concluded those proceedings does not make review of such orders moot because this is the kind of controversy that is capable of repetition yet evading review. Valenti, 987 F.2d at 712; Newman, 696 F.2d at 800.

The Validity of the Order

Section 3006A(c) of the CJA provides that "[i]f at any stage of the proceedings, including an appeal, the United States magistrate [judge] or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided [in the act]." Section 3006A(b) states that the magistrate judge or the court, "if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him." Addendum Four (d)(2) of the Eleventh Circuit's CJA plan provides

> Unless approved in advance by [the court of appeals], the district court is not authorized to appoint counsel on appeal to represent a defendant who was represented in the district court by retained counsel without first conducting an in camera review of the financial circumstances of the defendant and of the fee arrangements between the defendant and retained trial counsel.

*450 Ellis argues that because the Addendum [FN2] makes an in camera hearing mandatory where appointment of CJA counsel is sought in the present circumstances, it precludes the later unsealing of the transcript of the hearing. As a textual matter, the Addendum does not sweep so broadly. Its thrust is to require full financial disclosure before a defendant previously represented by retained counsel may have CJA counsel appointed. Thus, it bars appointment "without first conducting an in camera review...." The plain meaning of the Addendum does not encompass the requirement Ellis reads into it: that information submitted in camera should remain perpetually under seal.

> FN2. Ellis asks us to examine the Eleventh Circuit's CJA plan in conjunction with a purported Local Rule 2.03(d) of the Middle District of Florida, which allegedly provides:
> If a defendant who had retained counsel during trial moves the court to proceed on appeal in forma pauperis or for appointment of Criminal Justice Act appellate counsel, retained counsel will be required to disclose in camera (1) the total amount of fees and costs paid, (2) by whom fees and costs were paid, (3) the costs actually incurred and services actually rendered. All information submitted will be viewed in camera by the court for the purpose of deciding the defendant's in forma pauperis motion and for determining whether retained counsel should continue to prosecute or defend the appeal.
> Although the rule is cited in the briefs of both parties, our research has failed to confirm the existence of this rule or any like it either at the time of the proceedings below or thereafter. Our analysis and conclusion, however, would be no different if the rule existed along with the Addendum.

Nor is it necessary for the Addendum's effectiveness to read into it a requirement that the transcript of the hearing be maintained under seal after the court has determined that this is no longer necessary. The purpose of in camera disclosure in the first instance is to protect the defendant's right to a fair trial; information may be revealed which, if it becomes public, may prejudice the defense. That purpose would not be served by maintaining the transcript under seal once the prosecution has been concluded.

Even if the Addendum were ambiguous, we would interpret it to avoid conflict with the First Amendment. "The public and the press have a qualified constitutional right to attend criminal trials." Valenti, 987 F.2d at 712 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 2619-20, 73 L.Ed.2d 248 (1982)). That right extends to post-trial proceedings. See Newman, 696 F.2d at 801. We held in Valenti that "where a court properly denies the public and the press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed." Id. at 714.

It is true that no reported cases have involved application of the First Amendment right of access to information about the fees and costs paid to and costs incurred and services rendered by retained counsel. The closest case is Suarez, 880 F.2d at 630-31, where a local newspaper sought access to court-approved CJA vouchers to obtain information on how much was being paid to appointed counsel and for what services. Defendants argued that the release of the vouchers prior to conclusion of all criminal proceedings against them would deny them the effective assistance of counsel and infringe the attorney-client privilege and work-product protection. The court held that the presumption of public access to criminal trials applied to documents filed in connection with criminal

proceedings, and that it applied to CJA vouchers because of the strong public interest in information about how public funds were being spent. It observed that if disclosure of particular information might be prejudicial, defendants would be able to seek special protection.

The instant case is analogous. Although it involves an inquiry into payment of private funds to retained trial counsel, the issue before the district court was whether Ellis, who was able to retain private counsel for trial, should be furnished CJA counsel on appeal at public expense. Ellis argues that it is unreasonable to inquire into confidential matters between client and counsel, such as financial arrangements and how time was spent. However, "[t]he identity of a client and the receipt of attorney's fees normally are not privileged matters." In re Grand *451 Jury Matter, 969 F.2d 995, 997 (11th Cir.1992). Such matters are privileged only if their disclosure would lead to uncovering privileged information. Id. at 998. Ellis does not argue that the unsealing of the transcript would have that effect, nor does he make a claim that he would be otherwise prejudiced.

We hold that Addendum Four (d)(2) did not bar the district court from unsealing the transcript of the in camera hearing and that the court's order was not an abuse of discretion. The order is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3230 & 94-2570

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

THE FERNANDINA BEACH NEWS-LEADER, INC.,
Intervenor-Appellee,

versus

LAWRENCE E. ELLIS, a/k/a Laurie Ellis,
Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___; ____F.2d____).

Before: KRAVITCH and BIRCH, Circuit Judges, and SCHWARZER*, Senior District Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

* Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.